

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMR Construction

Case No. **10-0233-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

**DECISION OF ACTING DIRECTOR OF INDUSTRIAL
RELATIONS AFTER RECONSIDERATION**

The Decision of Director ("Decision") affirming the Civil Wage and Penalty Assessment ("Assessment") was issued on December 31, 2010. In summary, the Decision found that RMR's employees were paid at the Laborer prevailing wage rate while doing work properly paid for at the Plumber's wage rate. RMR filed a Motion for Reconsideration on January 13, 2011, on the following grounds:

1. Failure to consider Scope of Work for Laborer -- Building Construction in prevailing wage determination ("PWD") SD-23-102-4-2006-1.
2. Rejection of Daily Reports as evidence.
3. Lack of discussion regarding RMR's attempt to clarify classification with DLSE.
4. Timeliness of the Assessment.

The Director granted RMR's motion and reopened the matter for the limited issues of determining whether RMR had good cause to belatedly produce the scope of work for Laborer -- Building Construction (SD-23-102-4-2006-1) and, if so, whether consideration of this scope of work affects the outcome of the case. The Director rejected all other bases for reconsideration as not supported by the record.

This Decision After Reconsideration affirms the Decision because there was no good cause not to have presented the scope of work in a timely fashion at or before the hearing and

because the scope of work would not change the result. For these reasons, the Acting Director affirms the Decision and upholds the Assessment.¹

A. No Good Cause Exists To Belatedly Admit The Scope Of Work - Laborer - Building Construction (SD-23-102-4-2006-1).

On October 1, 2010, the parties were ordered to submit exhibit lists to the Hearing Officer at least three weeks prior to the first day of the Hearing, October 29, 2010. The Order also stated that actual exhibits were to be submitted at the time of trial. RMR did not submit an exhibit list. Despite lack of an exhibit list, Craig Rogers, the owner of RMR, brought several documents to the Hearing. RMR sought to introduce two documents as exhibits, which were admitted as Exhibit A (scope of work provision for Laborer -- Engineering Construction for San Diego County (SD-23-102-3-2006-1) and Exhibit B (Fax from RMR to DLSE dated September 20, 2010, and its attachments). On November 15, 2010, RMR submitted a post trial brief. This brief was accompanied by several attachments, including Exhibit A, as well as Important Notice Regarding the San Diego Laborers' (Engineering Construction) General Prevailing Wage Determination, Notice Regarding Advisory Scope of Work for the Southern California Laborers' General Prevailing Wage Determination, Important Notice Regarding the San Diego Laborers' (Engineering Construction) General Prevailing Wage Determination 2004 through 2009, and Definition of Work Jurisdiction between U.A. Pipe tradesman and U.A. Plumber/Pipefitter, that had not been introduced at the hearing. At no time did RMR seek to introduce the scope of work for Laborer – Building Construction (SD-23-102-4-2006-1) (“Subject Scope of Work”).

It was only in RMR's Motion for Reconsideration that it sought to have the Director consider the Subject Scope of Work to meet RMR's burden to show the Assessment was incorrect. RMR now argues that it did not know that it was required to present all relevant documents at the time of trial and that it did not know that it could not submit any additional documents after the trial.

The proper scope of work was the central question at the hearing. RMR was clearly informed that the exhibits were to be submitted at the time of trial. RMR in fact brought some

¹ For the sake of brevity, the underlying facts of the case set forth in the Decision will not be repeated here.

documents to the hearing that were relevant to the scope of work it claimed was the appropriate one on which to base a prevailing wage rate. None of RMR's proffered documents was excluded. RMR additionally attached documents to its post trial brief relevant to the appropriate scope of work, which were considered by the Director.

RMR admits that it was ignorant of the applicable procedural law and therefore it did not comply with them; RMR makes no showing of any attempt to ascertain what it needed to do to present its case. RMR seeks latitude because it was not represented by counsel but by a layperson. The record shows that it was afforded substantial latitude precisely because it was not represented by counsel. RMR does not claim that it did not know that the Subject Scope of Work was central to its defense or that it was ignorant of the existence or applicability of the one on which it now relies. It is well established ignorance of the law is not an excuse for not complying with it. (*See e.g. In re Karpf* (1970) 10 Cal.App.3d 355.)

RMR's showing for reopening the record is deficient as it is entirely based on inexcusable neglect; it is simply seeking a third "bite of the apple." There is no good cause to admit belatedly produced Subject Scope of Work.

B. Even If The Subject Scope Of Work Were Considered, The Outcome Does Not Change.

The issue at the hearing was whether the work performed was subject to the prevailing wage rate for Plumbers or Laborers. The Assessment determined the proper rate was that for Plumbers, and RMR had the burden to prove this was incorrect. (Lab. Code, § 1742, subd. (b), 2d par.) The Subject Scope of Work does not change this outcome.

The Subject Scope of Work under Section B states that it "shall cover all works ..., including all work involved in laying and installation of pipe." Section B then continues to list a number of different specific work covered such as;

(1) ... work on building, heavy highway, and engineering construction ...

* * *

(4) All work involved in laying and installation of pipe outside of a building, structure or other work ...

(5) All work involving in laying and installation of pipe both outside and within sewage filtration and water treatment ...

(Section 4B of the Subject Scope of Work.) RMR argues that this scope of work applies because Section B uses the phrase “all work ... including all work involved in laying and installation of pipe.” It is undisputed that the Project did not call for laying or installation of pipes outside a building or for sewage filtration or water treatment pipes.

As a rule, the language of an instrument must govern its interpretation if the language is clear and explicit. [Citations.] A court must view the language in light of the instrument as a whole and not use a ‘disjointed, single-paragraph, strict construction approach’ [citation]. If possible, the court should give effect to every provision. [Citations.] An interpretation [that] renders part of the instrument to be surplusage should be avoided. [Citations.]

(*Ticor Title Ins. Co. v. Rancho Santa Fe Assn.* (1986) 177 Cal.App.3d 726, 730.) If the Subject Scope of Work is read to cover any and all laying and installation of pipe under Section 4B or in connection with “work on building, heavy highway, and engineering construction” under Section B(1), the language of subsections (4) and (5) would be surplusage. Giving effect to all of the words in Section B leads to the conclusion that “all work” is modified by “**on**” buildings (not necessarily **in** buildings), outside of buildings, and inside and outside of water filtration plants. Thus, the Subject Scope of Work covers pipe fitting work only when the pipes are on, outside of, or for sewage filtration or water treatment pipe.

RMR attempts to find further support in Section H which provides “[w]ork involved in *laying and installation of pipe which is covered by this Agreement* shall include, but shall not be limited to: (1) All work *incidental to the laying of pipe* ... (2) Industrial pipe fitting *in connection with Laborer’s work*. ... (4) Welding, certified or otherwise *in connection with Laborer’s work*.” (emphasis added.) This argument fails because Section H only provides that specific tasks are covered if the underlying work is covered by the Subject Scope of Work. It does not provide independent basis to find that the Subject Scope of Work applies. Thus, pipe fitting work done by RMR employees do not fall within the Subject Scope of Work.

C. Issues Improperly Raised Outside The Scope Of The Limited Reopening Are Rejected.

In spite of the limited scope of reconsideration, RMR submitted additional arguments and documents not permitted by the Director's Order. These arguments and documents were not considered as either waived because they were not raised timely or were already decided.

- Whether the Assessment was timely. [waived]
- Whether the Enforcing Agency properly investigated the complaint. [waived]
- Whether the Enforcing Agency met the burden of proving prima facie case. [waived]
- Whether RMR was entitled to use Laborer classification because such classification was permitted in the work RMR performed previously. [decided]
- The nature of work performed by RMR employees. [decided]
- Credibility of the inspector, Mr. Johnson's statements (electronic mails). [waived]
- Whether RMR's employees were apprentices as recognized under the prevailing wage law. [decided]
- Whether the Scope of Work Engineering Construction (SD-23-102-3-2006-1) is applicable. [decided]
- Whether RMR's error in classifying its employee had objective basis in law or facts. [decided]
- Objections to testimony taken and exhibits admitted at the hearing. [waived]

Furthermore, RMR improperly submitted additional documents and evidence contrary to the Director's Order regarding limited reopening of the case. The following exhibits were improperly submitted and are excluded:

- Exhibit A (Declaration of Craig Rogers) to the extent it discusses the issues outside of the limited reopening.
- Exhibit B (actual exhibit not supplied).
- Exhibit C (Advertisement for Bids)
- Exhibit E (Statement from Jim Gillie of University of California, San Diego).

DECISION AND ORDER

The Decision issued on December 31, 2010 is reinstated in its entirety. The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision after Reconsideration and the original Decision. No further reconsideration will be allowed. RMR shall have its statutory period in which to seek further relief from the date of service of the Notice of Findings, Decision After Reconsideration, and Decision.

Dated: May 10, 2011

A handwritten signature in cursive script, reading "Christine Baker", written over a horizontal line.

Christine L. Baker, Acting Director of Industrial Relations